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NTSB Order No. EA-3474

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 8th day of January, 1992

BARRY LAMBERT HARRIS, Acting
Administrator,
Federal Aviation Administration,

Complainant,

v.

ANDREW NUNES-VAIS,

Respondent.

Docket SE-9313

OPINION AND ORDER

Respondent has appealed from the oral initial decision Administrative Law Judge Joyce Capps issued at the conclusion of an evidentiary hearing held April 13, 1989.¹ The law judge affirmed an order the Administrator issued May 11, 1988, suspending respondent's commercial pilot certificate for 60 days for his alleged unauthorized operation within the New York terminal control area (TCA) in violation of section 91.90(a)(1)(i) of the Federal Aviation Regulations (FAR),

¹A copy of the initial decision, an excerpt from the transcript, is attached.

which requires that an appropriate authorization be obtained from air traffic control (ATC) prior to operating in a TCA, and, residual to that, a violation of FAR section 91.9, which prohibits careless or reckless operation of an aircraft.

However, for lack of evidence, the law judge dismissed an alleged violation of FAR section 91.65(a), flight so close to another aircraft as to create a collision hazard.²

Nevertheless, she ordered that the sanction imposed by the Administrator be affirmed, without reduction. For the reasons that follow, we will deny the appeal and affirm the initial decision.

The Board finds no merit in respondent's contentions on appeal. Specifically, the respondent argues that his departure clearance from Teterboro amounted to a valid

²FAR sections 91.90(a)(1)(i), 91.65(a), and 91.9 read:

"§ 91.90 Terminal control areas.

(a) Group I terminal control areas--

(1) Operating rules. No person may operate an aircraft within a Group I terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(i) No person may operate an aircraft within a Group I terminal control area unless he has received an appropriate authorization from ATC prior to the operation of that aircraft in that area.

§ 91.65 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

clearance to enter the TCA, citing Administrator v. Swanson, Order EA-2723 (1988); and that, because his engine had begun to run rough, he was experiencing an emergency and was not required to request an additional clearance before exercising emergency authority under FAR section 91.3(b).³ The Administrator has filed a brief in reply. We are not persuaded that an instruction respondent received from the Teterboro tower controller during a climbout from Teterboro Airport can be construed as an "appropriate authorization" to enter the New York TCA, and we think the law judge properly rejected respondent's claim that his rough engine should excuse his conduct.

The record does not reveal where or when respondent entered the TCA but only that, when he reached 2900 feet, he was in the TCA in an area where the TCA floor is 1800 feet. The record also establishes that respondent was cleared for takeoff by a controller in the Teterboro tower and was given a right hand turn approved at or above 800 feet (Exh. A-2, transcript of the tower tape). Shortly thereafter, respondent was instructed to, "...continue straight out momentarily, got a Commander departing 24." He was then

³ FAR section 91.3(b) reads:

§91.3 Responsibility and authority of the pilot in command.

(b) In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart [Subpart A] or of Subpart B to the extent required to meet that emergency.

instructed to depart Northwest bound, as requested.

Controller Semcken testified that he did not see respondent's plane on the radar until it had ascended to 2900 feet.

(Semcken was monitoring the airspace in the area south of Teterboro starting from the floor of the TCA at 1800 feet).

In addition to the testimony given by the two controllers, an ATC expert was called by the Administrator to explain how the departure from Runway 19 should have been executed. He testified that a pilot is required to maintain a rate of climb and airspeed that permit the pilot to avoid the TCA. Respondent, in turn, testified that he was familiar with the airspace and knew the procedures. Respondent contends he was under the guidance of the Teterboro tower controller at the time he entered the TCA. The law judge addressed that contention at some length, however, finding that, given respondent's experience (commercial pilot with 850 flight hours), he should have known that, before entering the TCA, he should have notified the TRACON controller. Accepting respondent's testimony that his engine began to run rough, the law judge pointed out that this was additional reason to coordinate with the TRACON concerning his operation within the TCA.

In light of respondent's level of flight experience, the Board agrees with the law judge that respondent should have known that he was required to obtain a clearance before entering the TCA and that the tower controller was not

authorized to and did not issue a clearance to respondent to do so. See, Administrator v. Duke, 4 NTSB 404 (1982).

We also agree with the law judge that respondent should have known he was required to remain clear of the TCA. Similarly, the Board agrees with the law judge that, by the time respondent's engine ran rough, he should already have taken the necessary precautions to either remain clear of the TCA or to request a clearance to enter the TCA. Moreover, respondent's claim that he climbed because of an emergency is seriously undercut by the fact that he did not either declare an emergency (or even notify the controllers of an engine problem) or descend to land immediately at one of the two very ample airports only a few miles away.⁴

The Board's holding in Swanson, cited supra, recognizes that, had respondent Swanson's plane been handled as IFR arriving traffic, as it should have been during a practice instrument approach when the TCA incursion occurred, his TCA entry would have been appropriate without any additional authorization. Here, by contrast, respondent's aircraft was VFR and properly treated as such, and, unlike Swanson, the facts of this matter do not indicate any ATC intention to allow a TCA entry.

⁴The evidence establishes that some of respondent's spark plugs needed replacement; hence, the law judge accepted his argument that his engine ran rough. She found, however, that that factor was by no means exculpatory. As respondent points out, he did not declare an emergency because he thought that the situation did not warrant such action.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, and the initial decision itself are both affirmed;
3. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.⁵

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁵For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).